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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

vs.

MARGARET W. LAVOIE AND
ROBERT L. LAVOIE, SR.,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ALABAMA

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, FARMERS INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, THE STATE FARM INSURANCE COMPANIES, AND TRUCK INSURANCE EXCHANGE AS AMICI CURIAE IN SUPPORT OF APPELLANT

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BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, FARMERS INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, THE STATE FARM INSURANCE COMPANIES, AND TRUCK INSURANCE EXCHANGE AS AMICI CURIAE IN SUPPORT OF APPELLANT

With consent of the parties, the American Insurance Association, the National Association of Independent Insurers, Farmers Insurance Exchange, Fire Insurance Exchange, the State Farm Insurance Companies, and Truck Insurance Exchange respectfully submit this brief as amici curiae in support of the Appellant.

INTEREST OF AMICI CURIAE

The American Insurance Association ("AIA") is a national trade association of approximately 175 property and casualty insurance companies. AIA's member companies account for approximately 25% of the property and casualty insurance written in the United States.

The National Association of Independent Insurers ("NAII") is the nation's largest property and casualty insurance trade association with more than 500 member companies. NAII members write nearly 40% of the property and casualty insurance in force in the United States.

Farmers Insurance Exchange, Fire Insurance Exchange and Truck Insurance Exchange are members of the sixth largest property and casualty organization in the United States. Together they are the nation's third largest underwriter of automobile and homeowner's insurance.

The State Farm Insurance Companies ("State Farm") are a group of insurance companies composed of State Farm Mutual Automobile Insurance Company and its wholly-owned subsidiaries and affiliates. The State Farm Insurance Companies together constitute the nation's largest property and casualty insurer, accounting for approximately 10% of the property and casualty insurance in force in the United States.

Amici are concerned that the pervasive and growing availability of punitive damages and the geometric increase in the size of punitive awards in recent years is fundamentally warping the compensatory function of the civil litigation system and is converting it into a punitive/windfall system. Unchecked, this trend threatens the capacity of the insurance industry to provide liability

insurance to the public at an affordable cost, and, as a consequence, to provide a source of funds from which to compensate injured claimants.[1]

More pertinent to this case, the insurance industry is concerned that with increasing frequency they and their insureds are the victims of large punitive damage awards which far exceed any known criminal fines. These harsh sanctions are imposed without the additional constitutional safeguards afforded criminal defendants and without any meaningful guidelines or limits as to their amounts. Nominally civil, punitive damages in purpose and effect are penal sanctions and are indistinguishable from criminal fines. Simply put, we are witnessing the emergence in our civil courts of a parallel system of criminal punishment without safeguards or limits. This, we submit, is constitutionally repugnant. We ask this Court to intervene and bring amici, their insureds and other victims of punitive damage awards within the ambit of constitutional protection.

SUMMARY OF ARGUMENT

In this brief, amici will briefly describe the dimensions of the punitive damage problem in terms of the rapidly growing number of punitive damage awards and the extraordinary increase in the size of these awards. Thereafter, we will demonstrate that under well-established principles punitive damages are criminal penalties and, as such, the current procedures under which the vast majority of the states impose these damages are constitutionally

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[1] Rightly so, the insurance industry has been called the banker of the tort system.

deficient. We will also demonstrate that, at the very least, punitive damages are sufficiently criminal in nature as to warrant granting punitive damage defendants additional constitutional protections not presently afforded in most civil cases. Finally, we will argue that the method by which punitive damages are determined in the great majority of states, without guidelines or limits, deprives defendants of due process of law.

INTRODUCTION: THE DIMENSIONS OF THE PUNITIVE DAMAGES PROBLEM

Forty-six states allow punitive damages in civil cases. 1 J. Ghiardi & J. Kircher, *Punitive Damage Law & Practice* § 4.16, at 18-22 (Supp. 1984). In 41 of these states, including Alabama, punitive damages have no compensatory aspect whatsoever; they are inflicted *solely* to punish and/or deter. *Id.*; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) ("Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence' " (quoting *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 350 (1974)). In these states, "[t]he objectives of an award of punitive damages are the same as those which motiviate the criminal law. . . . " *Mattyasovszky v. West Towns Bus Company* 61 Ill.2d 31, 35, 330 N.E.2d 509, 511 (1975.)[2]

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[2] *See also Abel v. Conover*, 170 Neb. 926, 931-33, 104 N.W.2d 684, 688-90 (1960); *Campen v. Stone*, 635 P.2d 1121, 1131 (Wyo. 1981); *Cox v. Theus*, 569 P.2d 447, 450 (Okla. 1977); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 188-89, 384 N.E.2d 353, 359-60 (1978).

Numerous courts and commentators have expressed concern that these penal sanctions are imposed without the additional safeguards traditionally afforded defendants in criminal cases.[3] The Washington Supreme Court cogently expressed these concerns over 90 years ago in *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 52, 25 P. 1072, 1074:

> [In actions for punitive damages] many of the time-honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions . . . are absolutely ignored. . . . The fallacy and unfairness of the position is made manifest when it is noted that a person can be . . . [held liable for punitive damages], the penalty for which is unlimited save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state,

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[3] *See, e.g., Fay v. Parker*, 53 N.H. 342, 386-97, 16 Amer. Rep. 270, 319-32 (1872); *Mattyasovszky*, 61 Ill.2d at 35-36; *Ness v. Hocks*, 272 Or. 210, 219-21, 536 P.2d 512 (1975); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 51-52, 25 P. 1072, 1073-74 (1891); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 300, 294 N.W.2d 437, 458 (1980); Grass, *The Penal Dimensions of Punitive Damages*, 12 Hast. Const. L.Q 241 *passim*; Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269, 322-51 (1983); Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U.Chi.L.Rev. 408, 434 (1967); McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 Depaul L.Rev. 571, 582-84 (1978), Peters, *Punitive Damages in Oregon*, 18 Willamette L.J. 369, 406-426 (1982).

> where the amount of the fine is fixed and limited by law. . . .

This Court has not yet had occasion to determine whether all of the safeguards afforded defendants in criminal trials are applicable in trials where punitive damages are at issue. Wheeler, *supra* note 3, at 273 n. 15. The results of the states' efforts in this regard are mixed: A few states have found the absence of safeguards compelling and thus have disallowed punitive damages altogether.[4] Several states allow defendants some, but not all, of the protections traditionally afforded in criminal or "quasi-criminal" trials.[5] Most states, including Alabama, offer

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[4] *See Barr v. Interbay Citizens Bank* 96 Wash.2d 692, 699-70 (1981); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 72-73, 389 A. 2d 66 (1972); *Fay*, 53 N.H. at 386-97, 16 Amer. Rep. at 319-32.

[5] Nine states, for example, raise the standard of proving entitlement to punitive damages from "preponderance of the evidence" to either "beyond a reasonable doubt" or variations of the "clear and convincing evidence" standard: Colorado (Colo. Rev. Stat. § 13-25-127 (1973)); Indiana (*Travelers Indemnity Co. v. Armstrong* 442 N.E.2d 349, 358-63 (Ind. 1982)); Maine (*Tuttle v. Raymond*, 54 L.W. 2035 (June 21, 1985)); Minnesota (Minn. Stat. Ann. § 549.20 (1985)); Montana (Mont. Code Ann. § 27-1-221(2) (1985)); Oregon (Or. Rev. Stat. § 30.925 (1983)); New York (*Roginsky v. Richardson-Merrell, Inc.* 378 F.2d 832, 843 (2d Cir. 1967)); Wyoming (*Cosgriff Bros. v. Miller* 10 Wyo. 190, 237, 68 P. 206, 217 (1902)); Wisconsin (*Wangen*, 97 Wis.2d at 300, 294 N.W. 2d at 458).

At least three states (Arizona, Georgia, and Maine) attempt to cure potential double jeopardy problems by allowing triers of fact to consider the existence of prior criminal sanctions in exercising their discretion to award punitive damages. *Puz v. McDonald*, 140 Ariz. 77, 78-79, 680 P.2d 213, 214-15 (Ct. App. 1984); *White v. Taylor*, 157 Ga.App. 328, 329, 277 S.E.2d 321, 322 (1981); *Hanover Insurance Co. v. Hayward*, 464 A.2d 156, 159 (Me. 1983).

At least two states (New York, and Wyoming) allow a bifurcated trial

punitive damage defendants no additional protections.

In addition, the absence of meaningful standards to govern the amount of punitive awards has been a matter of concern.[6] While this Court has not yet directly addressed this concern, it has acknowledged that the absence of standards is a problem. *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 350 ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.")

Until recent years, the problems of inadequate procedural safeguards afforded punitive damages defendants and the lack of meaningful standards to govern the amounts of punitive damage awards have received less attention because "punitive damages awards occurred infrequently, their size, when they did occur, was relatively small, and the cases in which they occurred involved, by and large, some of the most egregious forms of intentional torts. " 2 J. Ghiardi & J. Kircher, *supra* p. 4, at § 22.01, p. 1. Today, however, all this has changed — dramatically. Juries are now imposing enormous punitive damages awards with great frequency in conjunction with an ever-increasing variety of claims.

Huge punitive damages awards are now commonplace. In California, since January 1, 1983, juries have awarded punitive damages in at least 240 cases, with verdicts totaling approximately $450 million. In 118 of these cases, the punitive damage award was $100,000 or more; in 38 the

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- one phase for liability and compensatory damages, a second (or "penalty") phase for punitive damages *Rupert v. Sellers*, 368 N.Y.S.2d 904, 912 (1975); *Campen*, 635 P.2d at 1132.

[6] *See* Wheeler, *supra*, note 3, at 288, 290-91.

award equalled or exceeded $1 million.[7] In the first six months of 1985, five California juries have awarded $242 million in punitive damages alone: *Micro/Vest v. Computerland*, No. 545255-4 (Alameda County Superior Court) ($125 million); *Haun v. N.E.C. Microcomputer, Inc.*, No. 175898 (Santa Clara County Superior Court) ($46 million); *Jewell v. Bank of America*, No. 112-439 (Sonoma County Superior Court) ($35 million); *Tan Jay International, Ltd. v. Canadian Indemnity Co.*, No. C 485516 (Los Angeles Superior Court) ($26 million); and *Rice Growers, Assn. v. Transamerica Delaval, Inc.*, No. 766-754 (San Francisco County Superior Court) ($20 million).[8]

California's experience is paralleled in other states. In Cook County, Illinois, for example, the average punitive damages award (measured in 1984 dollars) increased from $4000 in the period 1960-64, to $489,000 in the period 1980-84.[9] In the past year and one-half, juries awarded $100 million in Texas (*Durrill v. Ford Motor Co.*, No. 79-3203 (28th Texas District Court, 1984)); $39 million in Oregon (*Christofferson v. Church of Scientology*, No. A779495184 (Multnomah County Circuit Court, 1985)); $25 million in New Jersey (*Guarrere v. Cessna Aircraft Co.*, No. 80-3285 (United States District Court, D.N.J., 1984)); and $22

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[7] These figures were compiled from a review of volume 27, no. 1 through volume 29, no. 36 of Jury Verdict Weekly, Inc.'s publication *Jury Verdicts Weekly*. This publication reports approximately 80-85 percent of all jury verdicts in California. *See* M. Shanley, M. Peterson, Rand Institute for Civil Justice, *Comparative Justice - Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980* 80 (1983).

[8] A number of these awards have been reduced either by the trial or appellate courts.

[9] M. Peterson/Rand Institute for Civil Justice, *Punitive Damages: Preliminary Empirical Findings* (No. WD-2714-ICJ) 13 (1985) [hereinafter cited as Peterson/Rand].

million in Illinois (*Duddleston v. Syntex Laboratories, Inc.*, No. 80-L-577 (Cook County Circuit Court, 1985)).

As numerous courts and commentators have recognized, in recent years punitive damage awards have greatly increased in frequency as well as magnitude.[10] In 1980-81 "[t]here were more punitive damages awards . . . than in the entire history of the United States." *Symposium: Punitive Damages*, 56 S.Cal.L.Rev. 155, 160 (1982). In Cook County, Illinois, in the period from 1960 to 1984, the number of punitive damage awards increased 1,800 percent. Peterson/Rand, *supra* note 9, at 11. In San Francisco County, California, the increase was some 350 percent. *Id.*

Punitive damages are also awarded in a greater variety of cases than ever before. In fact, "[t]hey are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago." Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S.Cal.L.Rev. 133, 133 (1982). In business tort and breach of contract cases, for example, punitive damage awards have increased 3,000 percent in Cook County, Illinois, and 1,000 percent in San Francisco County, California, in the period 1960-1984. Peterson/Rand, *supra* note 9, at 23. In 1980, Justice Elkington of the California Court of Appeal expressed his fear that "the law of punitive damages as it has developed in this state no longer serves any public policy, or the legitimate interests of the unentitled recipients of its constantly accelerating largess." *Rosener*, 110 Cal.App.3d

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[10] *See, e.g., Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 762, 168 Cal.Rptr. 237, 250 (1980) (Elkington, J., concurring); Priest, *Punitive Damages and Enterprise Liability*, 56 S.Cal.L.Rev. 123, 123 (1982); Wheeler, *supra* note 3, at 271; 2 J. Ghiardi & J. Kircher, *supra* p. 4, at § 21.01, p. 1.

at 758, 168 Cal.Rptr. at 248. Noting "the present-day practice of seeking punitive damages in substantially *all* damage actions," Justice Elkington concluded:

> Thus in a sense we, even the most prudent among us, are constantly threatened by an immovable and treacherous Sword of Damocles. For a misguided act or perhaps the misguided verdict of a jury any of us . . . is subject to possible visitation of disaster.

Id. at 762-63, 168 Cal.Rptr. at 251.

We urge this Court to sheath the punitive damages "Sword of Damocles" by requiring additional procedural protections and meaningful standards to govern the amount of punitive awards. We turn first to the question of procedural protections.

LEGAL DISCUSSION

A. PUNITIVE DAMAGES ARE CRIMINAL PENALTIES IN BOTH NATURE AND EFFECT.

The distinction between a civil penalty and a criminal penalty is constitutionally significant. *United States v. Ward*, 448 U.S. 242, 248 (1980). When a state sanctions a defendant "for the purposes of punishment" rather than as "an incident of some other legitimate governmental purpose," *Bell v. Wolfish*, 441 U.S. 520, 538 (1979), due process requires that significantly greater procedural safeguards be accorded the defendant than are required in ordinary civil trials. *Ward*, 448 U.S. at 248. This is true even when the penalty takes the form of an economic sanction. *Id.* at 244-49. So long as it is designed primarily to punish, a

fine or other economic sanction may not be imposed without according the defendant additional procedural safeguards. *Id.* at 248-254.

The question whether a penalty imposed by statute is civil or criminal (i.e., whether it is primarily designed to punish or to serve some other purpose) is a matter of both legislative intent and statutory effect. As explained in *Ward*, 448 U.S. at 248-49:

> Our inquiry . . . [into whether a penalty is civil or criminal has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. [Citations.] Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

Thus, the purpose and effect of a punitive statute controls whether it is characterized as criminal or civil.

To determine whether the punitive damage laws in Alabama and most other jurisdictions provide sanctions so punitive in purpose and effect as to constitute criminal penalties, we turn to the seven criteria listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69(1963):

> [T]he tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character. . . . [are:] [1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will

> promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . . (Footnotes omitted.)

We are aware that these criteria are "neither exhaustive nor conclusive on the issue." *Ward*, 448 U.S. at 250. Nevertheless, as we now demonstrate, the *Kennedy* criteria, as applied in Alabama and the vast majority of other jurisdictions, strongly point in the direction of punitive damages constituting criminal penalties.

1. Punitive Damages Involve An Affirmative Disability Or Restraint.

One of the primary goals of the criminal law is deterrence. To the extent an economic sanction fosters this goal, rather than the goal of compensation, it partakes of the character of a criminal law. In *Atlas Roofing Co. v. Occupational S. & H. Rev. Com'n*, 518 F.2d 990, 1001 (5th Cir. 1975), the Court of Appeal concluded that a fine imposed for the purpose of deterring future misconduct and compelling compliance with OSHA safety standards constituted a "restraint" under the *Kennedy* test. Since punitive damages constitute "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence," *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 48, they necessarily also constitute "restraints" under this test. Thus, this criterion favors interpreting punitive damages as criminal penalties.

2. Punitive Damages Have Historically Been Regarded As Punishment.

With the exception of a few jurisdictions which limit punitive damages to compensation for specified injuries,[11] punitive damages in this country[12] have historically been regarded as serving one purpose and one purpose only — punishing defendants and making examples of them.[13] Early Alabama cases explicitly stated that punitive damages

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[11] In the handful of states which characterize punitive damages as compensatory, the term "punitive" is largely a misnomer. In Connecticut, for example, punitive damages are limited to the plaintiff's costs of litigation less taxable costs. *Doroszka v. Lavine*, 111 Conn. 575 578, 150 A. 692, 693 (1930). Thus, "the purpose of exemplary damages and the rules for their determination [in that state] indicate that they are essentially compensatory, not punitive, in fact and effect." *Lanese v. Carlson*, 32 Conn.Supp. 163, 167, 344 A.2d 361, 364 (1975). Georgia has the unique rule that punitive damages are allowed to compensate for the "wounded feelings" of the plaintiff or to deter the defendant, but not both. *See Westview Cemetery Inc. v. Blanchard*, 234 Ga. 540, 543-46, 216 S.E.2d 776, 779-80 (1975).

[12] At English common law punitive damages served dual purposes: to punish the defendant and deter future misconduct (*see, e.g., Wilkes v. Wood*, 98 Eng.Rep. 489, 498-99 (C.P. 1763); *Huckle v. Money*, 95 Eng.Rep. 768, 769 (C.P. 1763)), and to compensate the plaintiff for such intangible losses as wounded feelings and injuries to pride. 2 F. Pollock & F. Maitland, *The History of English Law* 537 (2d ed. 1909).

In England and a vast majority of United States jurisdictions, as tort law has expanded to include compensation for pain, suffering, and emotional distress, the compensatory element of punitive damages has fallen by the wayside. *See Cassell & Co. Ltd. v. Broome* [1972] A.C. 1027, 1029 (H.L.); 12 *Halsbury's Laws of England* 470-471, 474-75 (4th ed. 1975); 1 J. Ghiardi & J. Kircher, *supra* p. 4, at § 4.16, p. 18-22.

[13] Even the earliest of American cases assessing exemplary damages show the "vindictive" nature of this type of sanction. *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 7 (1784); *Wilson v. Middleton*, 2 Cal. 54, 57 (1852).

were awarded solely to punish the wrongdoer and deter wrongful conduct in the future. *See Birmingham Waterworks Co. v. Keiley*, 2 Ala.App. 629, 637-38, 56 So. 838, 841 (1911); *Bowles v. Lowery*, 5 Ala.App. 555, 559, 59 So. 696, 697 (1912).

The "punitive" character of such damages is noted in the Restatement (Second) of Torts § 908 (1979):

> The purposes of awarding punitive damages, or "exemplary" damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future.

3. Punitive Damages Come Into Play Only On A Finding Of Scienter.

In analyzing the distinction between a civil and penal sanction, one of the relevant factors courts have focused on is whether imposition of the sanction hinged on the defendant's state of mind. In *Child Labor Tax Case*, 259 U.S. 20 (1921), for example, the Court determined that a tax imposed only on employers who *knowingly* employed children under 14 years of age was, in light of this *mens rea* requirement, a penal sanction. This Court explained that "[s]cienters are associated with penalties, not taxes." 259 U.S. at 37. Since "[a]ll jurisdictions require some element of 'knowing wrongdoing' to justify awards of punitive damages," Grass, *supra* n. 2, at 270-71,[14] this criterion also

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[14] In Alabama punitive damages may be awarded where the wrongful act is maliciously perpetrated or done knowingly, wantonly, and recklessly, under such circumstances as to indicate that the wrongdoer knew the act would probably injure persons or property, or where the act was so grossly negligent, oppressive, or fraudulent as to amount to

favors interpreting punitive damages as criminal in nature.

4. Punitive Damages Promote The Traditional Aims Of Punishment — Retribution and Deterrence.

As this Court has explicitly recognized, punitive damages in Alabama and the vast majority of jurisdictions promote retribution and deterrence through punishment. *Gertz*, 418 U.S. at 350 (punitive damages serve "to punish reprehensible conduct and deter its future occurrence"); *see also Birmingham Waterworks Co. v. Keiley*, 2 Ala.App. at 37-38, 56 So. at 41; *Ex Parte Clare*, 456 So. 2d 357, 358 (Ala. 1984). Hence, this criteria also favors interpreting punitive damages as penal in nature.

5. The Behavior To Which Punitive Damages Are Applied Is Often Also Proscribed By The Criminal Law.

Where civil laws are used to penalize activities which are also proscribed by the criminal law, this Court has ruled that these "civil" sanctions cannot be levied without according defendants greater procedural protections than normally apply in civil cases. *See, e.g., Lipke v. Lederer*, 259 U.S. 557, 562 (1922), (cited with approval in *Kennedy*, 372

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malice. *Bowles v. Lowery*, 5 Ala.App. at 559, 59 So. at 697. The minimum standard is "gross negligence," i.e., such a lacking in care as would raise the presumption that the defendant is conscious of the probable consequences of his carelessness and indifferent to the danger of injury to the person or property of others. *Alabama Power Co. v. Dunlap*, 240 Ala. 568, 200 So. 617, 621 (1941).

U.S. at 168, n. 26); *United States v. La Franca*, 282 U.S. 568, 575 (1931) ("[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punishment proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action.") Since punitive damages are frequently awarded against defendants for conduct which is already proscribed by the criminal law,[15] this criterion also supports interpreting punitive damages as criminal in nature.

6. Punitive Damages Serve No Purposes Other Than Punishment and Deterrence.

The characterization of a law as criminal or civil also turns on the purpose it is designed to serve. Civil sanctions which serve only to punish and deter are deemed to be penal; on the other hand, where sanctions serve both a punitive and nonpunitive purpose, some courts have concluded that these sanctions should not be treated as penal in nature. *See United States v. Ward*, 448 U.S. at 250; *Atlas Roofing Co. v. Occupational S & H Rev. Com'n*, 518 F.2d at 1010.

Punitive damages, however, serve no purpose other than to punish and deter. They are unrelated to any injury, expense, or cost of the plaintiff. *See Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 48; *see* footnote 1 *supra* and accompanying text.[16]

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[15] "There is no doubt that many punitive damages verdicts are premised on criminal deportment." Grass, *supra* note 3, at 291.

[16] "[W]hile punitive damages might provide an incentive to prosecute suits in society's interest, justifying them on this ground clearly

Other penalties such as treble damages under the Clayton Antitrust Act (15 U.S.C. § 15) and the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-1968) serve as a useful contrast to punitive damages.[17] These penalties bear a legislatively-determined ratio to actual damages and serve many purposes other than those served by punitive damages. For example, they act as "liquidated damages" to cover litigation costs or to compensate for speculative injuries. *Rex Trailer Company v. United States*, 350 U.S. 148, 153-54 (1956); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 854-57 (8th Cir. 1952) *cert. denied*, 343 U.S. 942 (1952). One of the focuses of the treble damage provisions thus is on compensation of injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 828 (9th Cir. 1963). Since the foregoing penalties serve both punitive and non-punitive functions, they are appropriately characterized as civil. *See U.S. v. Ward*, 448 U.S. at 250; *Atlas Roofing Co. v. Occupational S. & H. Rev. Com'n*, 518 F.2d at 1010.

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acknowledges that the doctrine furthers the punitive ends of criminal law." Gross, *supra* note 3, at 301.

The incentive theory is also contradicted by the disfavored status of such awards. *See Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). *See also Rosener v. Sears Roebuck & Co.*, 110 Cal.App.3d 740, 750, 168 Cal.Rptr. 237, 242 (1980); *Lewiston Pistol Club, Inc. v. Imthurn*, 94 Idaho 264, 266, 486 P.2d 275, 277 (1971); *McElwain v. Georgia-Pacific Corp.*, 245 Or. 247, 249, 421 P.2d 957, 958 (1966).

[17] *See Sedima v. Haroco*, ___U.S.___, 53 L.W. 5034 (July 1, 1985). *See also Wahba v. H & N Prescription Center, Inc.*, 539 F.Supp. 352, 356 (E.D.N.Y. 1982).

Punitive damages, on the other hand, focus solely on punishing the wrongdoer rather than compensating the victim, and as the instant case attests, often bear no relationship to actual damages. Indeed, they are often awarded in conjunction with only nominal compensatory damages. Because of their limited purposes, this factor also supports characterizing punitive damages as penal.

7. Even If Punitive Damages Served An Alternate Purpose (They Do Not), They Are Excessive In Relation To Any Such Purpose.

Punitive damages serve no purpose other than to punish and deter. However, even if some other purpose could be formulated, the proliferation of huge awards nationwide discloses a pattern of excess unrelated to any legitimate purpose. For example, in the present case, a $3,500,000 punitive damage award is far beyond anything which could be justified when the actual injury is worth less than $1,700.[18]

In sum, punitive damages are intended to be and are in fact solely penal in nature; They have as their objectives retribution and deterrence. As this Court noted in *Bell v. Wolfish*, 441 U.S. at 539 n. 20, "[r]etribution and deterrence

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[18] In Alabama, punitive damages need not bear any particular relationship to actual damages. *Carroll Kenworth Truck Sales, Inc. v. Leach*, 396 So. 2d 1044, 1046 (Ala. 1981). Punitive damage awards are not reversed on appeal unless they shock the judicial conscience. *U-Haul Co. of Alabama v. Long*, 382 So. 2d 545 (Ala. 1980). The disparity between $1,700 and $3,500,000 did not shock the conscience of the Alabama Supreme Court.

are *not* legitimate non-punitive governmental objectives." When the civil law inflicts punishment through punitive damages it acts as the surrogate of the criminal law. Accordingly, a defendant facing punitive damages should be entitled to the constitutional safeguards which due process demands whenever punishment is meted out in the criminal system. This is especially true today, when, as shown above, punitive damage awards in some jurisdictions average nearly $500,000, and multi-million dollar awards are commonplace.[19]

B. EVEN IF PUNITIVE DAMAGES ARE CONSTRUED AS "CIVIL" PENALTIES, PUNITIVE DAMAGE DEFENDANTS SHOULD BE AFFORDED ADDITIONAL PROCEDURAL PROTECTIONS.

Due Process requires that extraordinary procedures be employed in certain civil contexts. *See Addington v. Texas*, 441 U.S. 418, 427 (1979). In this section we will demonstrate that two such procedures — elevated standards of proof and trial bifurcations — should be applied to punitive damage actions, regardless of whether punitive damages are characterized as civil or criminal penalties. These two protections have thus far been afforded punitive damage defendants in only a few states.

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[19] *See* text accompanying footnotes 6 and 7.

1. A Higher Standard Of Proof Than Preponderance Of The Evidence Is Necessary To Lower The Risk Of Unwarranted Punishment.

As noted above, several states have adopted higher standard of proof requirements for punitive damages than the "preponderance of evidence" or "greater weight of the evidence" standard which governs the normal compensatory aspects of civil law. Colorado has enacted legislation requiring proof "beyond a reasonable doubt." Colo. Rev. Stat. § 13-25-127 (2) (1973). Other states, recognizing the "quasi-criminal" nature of punitive damages, require proof bu variations of the "clear and convincing" evidence standard.[20]

The Indiana Supreme Court, in mandating that punitive damages in that state be proven by "clear and convincing evidence," observed that due process may require a higher standard of proof where "fundamental rights are involved and the legal and social ramifications of the civil proceeding are serious." *Travelers Indemnity Company v. Armstrong*, 442 N.E.2d 349, 362 (1982). In explaining the necessity of a higher standard of proof in punitive damages cases, the court reasoned as follows:

> We have repeatedly said that . . . [punitive] damages may be awarded in an appropriate case, as a punishment for the offense and to deter similar misconduct. It has never been implied that a plaintiff has any entitlement to such damages. Rather, he is merely the fortunate recipient of the "windfall." It cannot be said, therefore, that a

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[20] *See* footnote 5, *supra*.

plaintiff seeking such a bonus is denied any right, if he be held to a degree of proof higher than is required in other actions. In fact, it is incongruous to permit a recovery of that to which there is no entitlement upon evidence that barely warrants a recovery of that which is the plaintiff's absolute right. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noninquitous human failing. For, just as we agree that it is better to acquit a person guilty of crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error. The public interest cannot be served by a policy that favors the latter over the former. And, just as the requirement of proof beyond a reasonable doubt furthers the public interest with respect to criminal cases, a requirement of proof

by clear and convincing evidence furthers the public interest when punitive damages are sought. *Id.* at 362-63.[21]

2. A Bifurcated Trial Is Necessary To Protect Defendants From Unnecessary Prejudice.

When punitive damages are at issue, the absence of bifurcation may have a measurable effect on the defendant's constitutional right to a fair trial free from prejudice or bias. Many jurors come to a trial resenting the size and wealth of corporate defendants. Evidence of that wealth, which is irrelevant to the issues of liability and compensatory damages, may therefore be highly prejudicial to the defendant.[22] A workable solution to this problem is a split-trial procedure in which the amount of punitive damages is not examined until after the trier-of-fact has determined punitive damages are warranted. In such a

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[21] A heightened standard of proof may also combat the inherent prejudices many jurors have against large and wealthy corporate defendants. Owen, *Problems in Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U.Chi.L.Rev. 1, 58-59 (1982).

[22] "[I]t is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function." Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1191 (1931).

procedure, a trial on the merits would explore both the underlying claim and the demand for punitive damages. If the facts are found to merit punitive damages, a separate proceeding would determine the amount. In addition, the defendant's financial information would not be admissible until after such an affirmative special verdict.

The split-trial procedure strikes a balance between the needs of the plaintiff and the rights of the defendant to a fair trial.[23]

C. IN ALABAMA AND THE VAST MAJORITY OF STATES NO MEANINGFUL STANDARDS GOVERN THE AMOUNT OF A PUNITIVE PENALTY. ABSENT THESE STANDARDS THE PENALTY IS UNDULY VAGUE IN VIOLATION OF DUE PROCESS.

This Court has recognized, "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz*, 418 U.S. at 350; see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981).[24] Like most other

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[23] In *Campen v. Stone*, 635 P.2d 1121, 1131 (Wyo. 1981), the court commented that a bifurcated trial on compensatory and punitive damages: "makes good sense. The plaintiff receives an appropriate redress for the wrongs he has suffered, the defendant is provided a prejudice-free atmosphere in which his liability may be assessed, and our society's interest in effecting punishment and deterrence for socially outrageous conduct is preserved."

[24] "Once it has found the requisite malice and has decided to award

states, Alabama sets no meaningful limit on the *amount* of the punitive penalty which may be imposed. The jury can award any amount it sees fit. *Yeager v. Hurt*, 433 So.2d 1176, 1181 (Ala. 1983).[25]

A few state courts have noted the incongruity between precise maximums set for criminal fines and the absence of any similar limits for punitive damage awards. *Mattyasovszky v. West Town Bus Co.*, 61 Ill.2d at 35, 330 N.E.2d at 511-12 ("The maximum and minimum amounts of the fine imposed by way of punishment and deterrence in a criminal case are fixed by statute. In the civil case, however, the jury is left at large to take from the defendant and deliver to the plaintiff such amounts as it sees fit"); *Brown v. Swineford*,

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some punitive damages, the jury in a discretionary punitive damages case receives no guidance with respect to the appropriate measure of punitive damages. Specifically, the law provides no guidance as to what constitutes appropriate punishment or what factors the jury should consider in deciding how much deterrence is desirable. . . . This complete absence of standards and guidance creates a serious risk of error in determining the size of punitive damages awards." Wheeler, *supra* note 3, at 285.

Cognizant of this risk, one state has recently adopted a limitation on punitive damages of $25,000 or 1% of the net worth of the defendant, whichever is greater. Mont. Code Ann. § 27-1-221(6) (1985).

[25] The Alabama appellate courts do little to rein in the jury's unlimited discretion, finding punitive awards excessive only "if they shock the judicial conscience or are so great as to indicate they are the product of sympathy, passion, or prejudice." *Village Toyota Co., Inc. v. Stewart*, 433 So.2d 1150 (Ala. 1983). "Appellate review . . . does little to minimize the risk of erroneous results in the present system, because the appellate process also lacks clear, consistent standards. . . ." Wheeler, *supra* note 3 at 288.

Further, in Alabama, the 10 percent penalty imposed by law on a losing appellant discourages seeking appellate review in the first place. Ala. Code § 12-22-72 (1975).

44 Wis. 282, 286 (1878) ("while the statute limits the pecuniary fine upon criminal prosecution for such an action, there is but vague limit to the punitory damages which a jury may find in a civil act. It certainly appears to be an incongruity . . .").

While this Court held in *Smith v. Wade*, 461 U.S. 30, 49 (1983), that a "recklessness" standard for determining *liability* for punitive damages is not "too vague to be fair or useful," as yet this Court has not addressed whether standards governing determination of the *amount* of a punitive award are sufficiently precise to pass due process muster. The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), where this Court said, inter alia:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges . . . and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (Footnotes omitted.)

Prevention of arbitrary and discriminatory enforcement is recognized to be "the more important aspect of the vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). It has application to standards for determining a penalty as well as liability. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute").

"The degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair

enforcement — depends in part on the nature of the enactment." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender* 461 U.S. at 359 n.8. Here, as explained above, punitive damages in purpose and effect impose a criminal penalty. Even if punitive damages properly could be considered civil in nature (they cannot), the present reality of enormous awards — far in excess of any fine which can be levied under existing criminal laws — means there is no room to tolerate vagueness. The consequences of imprecision, albeit financial, are frequently draconian.

This Court also has recognized that punitive damages are susceptible to the vice of arbitrary and discriminatory enforcement, the primary evil which the vagueness doctrine addresses. "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50-51 n. 14. The "unpopular defendants" in this context are frequently those with wealth, primarily corporations, especially insurance companies. "It is a good guess that rich men [corporations] do not fare well before juries, and the more emphasis placed on their riches, the less well they fare." Morris, *supra* note 1, at 1191. The need for specific standards to guide jury discretion in order to prevent punitive awards which are arbitrary and discriminatory in amount is apparent.

At bottom, one is hard pressed to devise a penalty more vague and destructive than that permitted by the states' punitive damages laws. There is no essential difference between these laws and a criminal fine without an upper limit. We are confident this Court would not countenance a law imposing a limitless fine. Neither should it countenance

these limitless punitive damages laws under which juries have rendered the incredible verdicts described earlier in this brief.

CONCLUSION

For the foregoing reasons amici respectfully request that this Court examine and reassess punitive damages in light of the due process principles we have discussed. Based on these principles, we submit the judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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